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No. 02-1315

IN THE
Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Petitioners.

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been involved in several cases where there was a clash between state laws and the federal constitution. In those cases, Liberty Counsel has successfully defended against arguments made by governmental entities that the state law constituted a compelling interest sufficient to justify discriminatory treatment of religious speech and beliefs. *See, e.g., Deida v. City of Milwaukee*, 206 F. Supp.2d 967 (E.D. Wis. 2002) (state law prohibiting leafletting of parked cars); *Falwell v. Miller*, 203 F. Supp.2d 624 (W.D. Va. 2002) (state constitutional provision prohibiting incorporation by churches).

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are enclosed with this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Article VI, clause 2 of the United States Constitution provides that federal constitutional rights preempt conflicting state constitutional provisions. As applied to this case, the Ninth Circuit Court of Appeals properly concluded that "a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal constitution." Pet. App. 27a. This Court should affirm the decision of the Ninth Circuit, finding that the discriminatory state restrictions on the use of Promise Scholarship funds for those pursuing theology majors unconstitutionally violated Davey's right to free exercise of religion.

ARGUMENT

A.

The Free Exercise Clause of the First Amendment Trumps Washington's Conflicting State Laws.

Article VI, clause 2 of the United States Constitution provides that "[t]his Constitution . . . shall be the supreme Law of the Land; . . . any Thing in the Constitutions or Laws of any State to the Contrary notwithstanding." Not surprisingly, therefore, this Court has repeatedly rejected the argument that compliance with a state law constitutes a compelling interest sufficient to justify infringement of a federal constitutional right. *See, e.g., Good News v. Milford Central School*, 533 U.S. 98, 107 n.2 (2001) ("Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law"); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor J., concurring in part and dissenting in part) ("The applicability of a provision of the Constitution has never depended on the vagaries of state or federal law"); *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Cooper v. Aaron*, 358 U.S. 1 (1958). The effort by the State of Arkansas to undermine this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) is a vivid reminder of the significance of the supremacy clause.

In 1954, this Court decided that forced racial segregation in State public schools was a denial of the equal protection of the laws, enjoined by the Fourteenth Amendment of our United States Constitution. *Cooper v. Aaron*, 358 U.S. 1, 5 (1958) (citing *Brown v. Board of Education*, 347 U.S. 483 (1954)). In response to this decision, the State of Arkansas passed an amendment to its State Constitution, commanding the Arkansas's General Assembly to oppose the desegregation decisions of this Court. *Cooper*, 358 U.S. at 8-9. Despite state efforts to undermine *Brown*, the Little Rock District School Board instituted administrative measures designed to desegregate the public school system in Little Rock. *Id.* at 7, 9.

On September 2, 1957, the day before desegregation was to begin in Little Rock, the Governor dispatched Arkansas National Guard units to Little Rock's Central High School. *Id.* at 9. The national guard placed the school grounds "off limits" to "colored" students. *Id.* After a series of similar events, the school board filed a petition in District Court seeking postponement of its desegregation program. *Id.* The District Court granted the relief, finding that "chaos, bedlam and turmoil" had caused and would continue to cause "serious financial burden" on the school district. *Id.* at 13. The District Court also found that the education of the students had suffered and would continue to suffer under the existing conditions. *Id.* at 13.

The Eighth Circuit reversed and this Court affirmed. *Id.* at 14. In its affirmance, this Court held that the constitutional rights at issue were not to be "sacrificed or yielded" to the

actions of the Arkansas Governor or Arkansas Legislature. *Id.* "The controlling legal principles are plain . . . ." *Id.* "The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* "In short," opined this Court,

> the constitutional right of children not to be discriminated against in school admission on the grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes ....

Id. at 17 (citation omitted).

In rejecting the State's contention that it was not bound by the Court's holding in *Brown*, this Court revisited "some basic constitutional propositions." *Id.* Significantly, this Court acknowledged that it was "settled doctrine" that Article VI of the United States Constitution (known as the "Supremacy Clause") makes the Constitution the "supreme Law of the Land." *Id.* at 18. Article VI, clause 2 makes the United States Constitution of binding effect on the States "'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Id.*

Thus, state constitutions cannot subtract or detract from the rights guaranteed by the Constitution. *See e.g., Reynolds v. Sims*, 377 U.S. 533, 581(1964) (stating that where there is an unavoidable conflict between the federal and state constitutions, the Supremacy Clause controls). That constitutional principle applies equally to a state's responsibility and undertaking of public education. *Cooper*, 358 U.S. at 19; *see also Brown v. Board of Education*, 347 U.S. at 493 (while it is true that the responsibility of public education is primarily the concern of the states, "it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal

constitutional requirements as they apply to state action").

The federal constitutional right before this Court is that of Davey's right to free exercise of religion and the burden placed on that federal right by the State's laws. Specifically, the state constitution provides that "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Article I, § 11. The Washington Rev. Code further provides that the Promise Scholarship cannot be awarded "to any student who is pursuing a degree in theology." Wash. Rev. Code section 28B.10.814. This case, therefore, pits a state law that provides for a broader "separation of church and state" than that of the federal constitution against the First Amendment right of free exercise.

In the past, this Court has struggled to find a neutral course between the two religion clauses, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with each other." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (holding property tax exemptions to religious organizations constitutional). On the one hand, the First Amendment "does not say that in every and all respects there shall be a separation of Church and State." *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). In fact, "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts - one that seeks to mark boundaries to avoid excessive entanglement." *Walz*, 397 U.S. at 669. The objective, then, is one of balance. The Washington constitutional provision tramples upon that balance.

In this case, Washington has discriminated against Promise Scholarship recipients who desire to major in theology, if that instruction "resembles worship and manifests devotion to religion and religious principles in thought, feeling, belief, and conduct." Pet. Br. at 22-23. The State does not dispute that it discriminates against Promise Scholarship recipients who wish to major in theology taught from a perspective that

presents the Bible as truth. Rather, the State argues that its state interest in achieving a broad separation of church and state constitutes a compelling justification for its discriminatory treatment of those students pursuing a theology degree. This Court's precedent demonstrates the lack of merit in Petitioners' argument.

In *Widmar*, the University of Missouri had a policy that prohibited use of university facilities "for purposes of religious worship or religious teaching" while permitting a wide variety of secular uses. 454 U.S. at 265. Pursuant to the policy, the university refused to allow a student religious group use of the university facilities. In striking down the policy, this Court held that the state's interest in providing "greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution" is not "sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 278. In other words, the state's interest was "limited by the Free Exercise Clause and . . . the Free Speech Clause . . . ." *Id.* at 277-78.

This Court came to the same conclusion in *McDaniel v. Paty*, 435 U.S. 618 (1978). In *McDaniel*, the Tennessee constitution contained a provision that disqualified ministers from serving as legislators. Specifically, it stated that "no minister of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the legislature." Tenn. Const., Art. VIII, § 1 (1796). This Court held that the state constitutional provision violated the federal constitutional rights of ministers.

> [T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. . . . Yet, under the clergy-disqualification provision,

> McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. 'To condition the availability of benefits including access to the ballot upon this appellant's willingness to violate a cardinal principle of his religious faith by surrendering his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties.

McDaniel, 435 U.S. at 626. "If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id.* at 634 (Brennan, J., concurring). Because the "provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. . . . [it] compels the conclusion that it violates the Free Exercise Clause." *Id.* at 632. *See also Falwell v. Miller*, 203 F.Supp.2d 624, 631 (W.D. Va. 2002) (finding the Virginia constitutional provision that prohibited incorporation of a church in violation of the free exercise clause of the First Amendment); *People v. Andrews*, 176 N.W.2d 460 (Wis. 1970) (finding state constitutional provision making search and seizure provision inapplicable to certain evidence held void).

So too, here, do the Washington laws impose a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity – namely, the right to pursue a theology degree from a perspective of Biblical truth. If Davey were to renounce his intention to pursue a theology degree, he would be eligible to receive the Promise Scholarship.

Accordingly, as in *McDaniel*, this Court should conclude that the state laws violate Davey's right to Free Exercise of religion. The Ninth Circuit's decision should be affirmed.

B.

Washington's Laws Violate The Establishment Clause.

The Washington laws also violate the First Amendment Establishment Clause. Petitioners argue that their State constitution forbids awarding Promise Scholarships to theology majors *if* the theology courses present the Bible as "truth." Thus, the State not only entangles itself in religious beliefs and doctrine, but is decidedly hostile toward religion. The First Amendment to the United States constitution requires the State to award Promise Scholarships on a religion-neutral basis, neither punishing nor rewarding religious beliefs.

Under the First Amendment, Washington State is constitutionally forbidden from enacting a law with the "purpose" or "effect" of inhibiting religion. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (stating that the Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing *or inhibiting* religion) (emphasis added) (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). Also under the First Amendment, the State is prohibited from enacting a law whose effect or purpose conveys a message of hostility toward religion. *See Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (finding that the proper inquiry was whether the government intended to convey a message of endorsement *or disapproval* of religion) (emphasis added); *see also Good News Club v. Milford Central School*, 533 U.S. 98, 114, 118 (2001) (stating that a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their *neutrality* towards religion,

and finding that the danger that children would misperceive the endorsement of religion was no greater than the danger that they would perceive a hostility toward a religious viewpoint, if the Club were excluded).

Under the auspices of the Washington State constitution, the State has enacted a policy which is decidedly *not* neutral toward religion. The State has singled out for discrimination any student who declares a major in theology *if* that major is taught from a religious perspective. Pet. Br. at 17. The Promise Scholarship program is unconstitutionally hostile toward religion.

The State laws also excessively entangle the State in religious matters. Drawing the distinction between those theology degrees pursued from the perspective of devotion to religion, from those that do not, requires the State – and ultimately the courts – to inquire into the "significance of words and practices of different religious faiths, and in varying circumstances by the same faith." *Widmar v. Vincent*, 454 U.S. 263, 270 n. 6 (1981). As this Court has held, "[s]uch inquiries . . . tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* (quoting *Walz*, 397 U.S. at 668). Indeed, Petitioners must have engaged in that religious inquiry in order to reach the conclusion that "Davey's coursework . . . was taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible." Appellees' Petition for Rehearing and Petition for Rehearing En Banc at 5. Such an inquiry necessarily entangles government with religion.

Petitioners miss the mark in suggesting that the State does not entangle itself with, or discriminate against, religion because it requires the school, rather than the State, to determine whether the student is pursuing an impermissible degree in theology. Pet. Br. at 8. Forcing schools to identify theology students who are not eligible for receipt of State scholarships does not cleanse the State of its discriminatory intent or of its hostility toward religion and religious adherents.

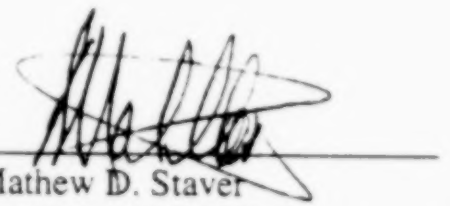
Under this Court's jurisprudence, it is irrelevant whether the State nullifies the right of students to equal educational opportunity openly and directly, or indirectly by "evasive schemes." *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

Petitioners also miss the mark in arguing that the State is not required to subsidize Respondent's constitutional right to pursue a theology degree. Pet. Br. at 22. While it is true that Petitioners are not constitutionally mandated to offer Promise Scholarships, once Petitioners embark in offering such educational opportunities, Petitioners are constitutionally required to offer and administer the scholarships in a religion-neutral manner. Offering the scholarships in a religion-neutral manner, but then revoking the scholarships if the recipient chooses to major in a certain type of theology is not "religion-neutral." "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (citing *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792, 793 (1973)). Washington's laws prohibiting receipt of a Promise Scholarship by students pursuing theology degrees violates that "proper respect . . . of neutrality toward religion" in violation of the establishment clause and of Davey's right to free exercise of religion.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,



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